

No. 12139

United States
Court of Appeals
for the Ninth Circuit

ANGEL L. PACK,

Appellant,

vs.

UNITED STATES OF AMERICA and LILLY
PACK,

Appellees.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

FEB - 4 1949

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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Los Angeles 13, Calif.

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United States Attorney,
ERNEST A. TOLIN,
CLYDE C. DOWNING,
ROBERT KOMINS,
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600 U. S. Post Office & Court House Bldg.,
Los Angeles 12, Calif.

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324 Elm Ave.,
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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the Southern District of California,
Central Division

No. 7651-BH

ANGEL L. PACK,

Plaintiff,

vs.

UNITED STATES OF AMERICA and LILLY
PACK,

Defendants.

COMPLAINT ON INSURANCE CONTRACT
ISSUED BY THE UNITED STATES
(With Demand for Trial by Jury)

Plaintiff complains of defendants and alleges:

I.

That this action is founded upon the National Service Life Insurance Act of 1940, as amended (Title 38, Chapter 13, U.S. Code) and Secs. 445 and 551 of Title 38, U.S. Code.

II.

That while Clyde A. Pack was a member of the armed forces of the defendant United States of America, he applied for and there was granted to him by said defendant \$10,000 of National Service Life Insurance effective March 6, 1944, under certificate N-15,813,803, for which he designated the defendant, Lilly Pack, his mother, as beneficiary, without the consent of plaintiff. [2]

III.

That said Clyde A. Pack died on or about June 11, 1945, and that at all times from and after the aforesaid contract of insurance was granted and issued, as aforesaid, said decedent paid all of the premiums thereon in the amounts and at the times as provided by law and the terms of said contract.

IV.

That plaintiff and the deceased insured, Clyde A. Pack, were married in Santa Ana, California, on or about June 24, 1932, and that at all times thereafter plaintiff and said insured were and continued to be husband and wife until such status was terminated by the death of said insured. That there were two children as the issue of said marriage, to-wit: Joanne Pack and Dennis Pack, and that both of them have survived their said father.

V.

That at and prior to June 24, 1932, and at all times thereafter during his lifetime, the aforesaid Clyde A. Pack was a resident of the State of California, and that plaintiff at all such times was a resident of said State and now is a resident thereof and of the Southern District, Central Division of said State and a resident of and domiciled in the County of Los Angeles thereof.

VI.

That plaintiff is informed and believes and upon such information and belief alleges that subsequent to March 6, 1944, and during his lifetime, said Clyde A. Pack changed the beneficiary under all of

the aforesaid insurance to plaintiff and designated plaintiff the sole beneficiary thereof.

VII.

That the defendant Lilly Pack resides in Kirksville, Missouri, and that she claims an interest in and to said [3] insurance contract adverse to plaintiff, but that each and every claim of said defendant Lilly Pack is wholly without right and subordinate to the claim and interest of plaintiff in and to the whole of the said insurance and the entire proceeds therefrom.

VIII.

That heretofore, and subsequent to the death of the aforesaid insured, plaintiff made a written claim and demand to and upon the defendant United States of America and to the Veterans Administration thereof, for payment of the proceeds of both of said contracts and the aforesaid entire insurance, and that thereafter, and prior to the commencement of this action, to-wit, on August 25, 1947, said defendant and its Veterans Administration, in writing, disagreed with plaintiff and refused to pay said claim or any part thereof, and that a disagreement exists between plaintiff and said defendant as to her claim, as aforesaid.

IX.

That plaintiff has employed Sylvester Hoffman & Irving G. Bishop, attorneys at law, admitted to practice before this Court, and members of the State Bar of California, to bring and prosecute this action and has incurred an obligation to pay her

said attorneys a reasonable attorneys' fee, but not to exceed the amount and payable in the manner as provided by Title 38, Sec. 551, U. S. Code.

For a further, separate and second cause of action, plaintiff complains of defendants, and each and both of them, and alleges:

I.

That plaintiff hereby repeats each and every of the allegations in paragraphs I, II, III, IV, V, VII, VIII [4] and IX of here first cause of action and incorporates each and every of said allegations, by reference, in this, her second cause of action.

II.

That all of the premiums paid by said insured, to-wit: Clyde A. Pack, were paid from and with community property of said insured and plaintiff.

For a further, separate and third cause of action, plaintiff complains of defendant Lilly Pack, and alleges:

I.

That plaintiff hereby repeats each and every of the allegations in paragraphs I, II, III, IV, V, VII, VIII and IX of her first cause of action and incorporates each and every of said allegation, by reference, in this, her third cause of action.

II.

That all of the premiums paid by said insured, to-wit: Clyde A. Pack, were paid from and with community property of said insured and plaintiff.

III.

That by reason of the foregoing facts, plaintiff became the owner of a present, existing and vested

interest in and to one-half of said insurance from the issuance and effective date thereof and in and to one-half of all the proceeds therefrom or payable thereunder and that in the event any of such proceeds have been paid to the defendant Lilly Pack, she holds one-half of the same in trust for plaintiff and if she receives any such proceeds thereafter, she will receive and hold one-half thereof in trust for plaintiff, and that as to one-half of all such proceeds which said defendant has or may hereafter receive, [5] such one-half is and will be the property of plaintiff, without any right, title or estate therein by or in the defendant Lilly Pack other than as trustee for plaintiff.

Wherefore plaintiff prays judgment:

1. Against the defendant United States of America, for all installments of insurance benefits which have accrued and which may hereafter be or become payable thereunder;

2. Determining that the insured, subsequent to the issuance of said insurance, designated plaintiff as beneficiary;

3. Determining that defendant Lilly Pack has no right, title, interest or estate in or to said insurance, whatsoever, or in or to any part thereof;

4. Determining, in the event that it is held that the insured at no time designated plaintiff as beneficiary thereunder, that said insurance was the community property of the plaintiff and said insured, and awarding plaintiff one-half of said insurance, requiring defendant Lilly Pack to account for any of the proceeds heretofore paid to her and

to deliver, forthwith, one-half thereof to plaintiff; and if such relief cannot be obtained, then that it be determined that Lilly Pack is the trustee for plaintiff as to one-half of all of the proceeds heretofore received by said defendant and which she may hereafter receive and requiring said defendant Lilly Pack to forthwith deliver said one-half of all such proceeds to plaintiff, forthwith upon the receipt thereof, and that a receiver be appointed or other appropriate relief be granted to enforce the terms of such judgment and that said defendant be required to give adequate security for the faithful performance of said trust; [6]

5. Determining and fixing her attorney's fees, not to exceed 10% of the amount recovered and to be paid under the judgment to be rendered herein, to be paid in the manner as provided by law;

6. And for all other and further relief as may be proper in the premises.

IRVING G. BISHOP &

SYLVESTER HOFFMAN,

By /s/ SYLVESTER HOFFMAN,

Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Sept. 26, 1948. [7]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant United States of America, by Ernest A. Tolin, Chief Assistant United

States Attorney in and for the Southern District of California, Clyde C. Downing, Assistant United States Attorney, and Robert Komins, Assistant United States Attorney, and for its answer to the complaint filed herein says:

ANSWER TO FIRST CAUSE OF ACTION

I.

The defendant admits the allegations contained in paragraphs numbered I, II, III and IV of plaintiff's complaint.

II.

For want of knowledge or information sufficient to form a belief as to the truth thereof, defendant denies the allegations contained in paragraph numbered V of the plaintiff's complaint.

III.

The defendant denies the allegations contained in paragraph numbered VI of the plaintiff's complaint. [9]

IV.

The defendant denies the allegations contained in paragraph numbered VII of the plaintiff's complaint, except to admit that Lilly Pack is the mother of the insured, Clyde A. Pack, and that she has an interest in the proceeds of insurance involved in this action and that such interest is adverse to the plaintiff herein.

V.

The defendant denies the allegations contained in paragraph numbered VIII except to admit that

the plaintiff made claim upon the United States of America for the benefits of the policy of insurance involved in this action, and that the claim of the plaintiff was duly denied by the Veterans' Administration by letter dated August 25, 1947.

VI.

The defendant denies the allegations contained in paragraph numbered IX of the plaintiff's complaint except to admit that in the event of plaintiff's recovery herein the Court, in its discretion, may award a reasonable attorney's fee to counsel for the plaintiff under Section 551, Title 38, U.S.C.A., but not to exceed 10% of the amount received by the judgment.

ANSWER TO SECOND CAUSE OF ACTION

I.

The defendant, in answer to paragraph numbered I of the Second Cause of Action of the complaint, repeats and realleges the admissions and denials made in defendant's answer to the plaintiff's First Cause of Action and numbered paragraphs I, II, III, IV, V, VII, VIII, IX, with the same force and effect as though the same were herein fully and at length set forth.

II.

The defendant denies the allegations contained in paragraph numbered II of plaintiff's Second Cause of Action.

ANSWER TO THIRD CAUSE OF ACTION

I.

The defendant, in answer to paragraph numbered I of the Third Cause of Action of the complaint, repeats and realleges the admissions and denials made [10] in defendant's answer to plaintiff's First Cause of Action and numbered paragraphs I, II, III, IV, V, VII, VIII and IX with the same force and effect as though the same were herein fully and at length set forth.

II.

The defendant denies the allegations contained in paragraph numbered II of the plaintiff's Third Cause of Action.

III.

The defendant denies the allegations contained in paragraph numbered III of the plaintiff's Third Cause of Action.

Wherefore, the defendant prays that upon hearing the Court:

1. Adjudge whether this defendant is obligated to pay the proceeds of policy No. N-15,813,803 to the plaintiff, Angel L. Pack, or to the defendant, Lilly Pack.

2. Discharge the defendant, United States of America, from any and all liability on policy No. N-15,813,803, except to the person who shall be adjudged to be entitled to receive such insurance benefits.

3. Award to the defendant, United States of America, its costs and such other relief as may to the Court seem proper.

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney

CLYDE C. WODNING and
ROBERT KOMINS,
Assistant U. S. Attorneys

By /s/ ROBERT KOMINS,
Attorneys for Defendant United States of America.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed March 19, 1948. [11]

[Title of District Court and Cause.]

ANSWER AND CROSS COMPLAINT

Comes now the defendant, Lilly Pack, and for answer to plaintiff's complaint admits, denies, and alleges as follows:

I.

Admits paragraph I of plaintiff's complaint.

II.

Admits paragraph II of plaintiff's complaint, excepting that this defendant denies that the designation of this defendant as beneficiary under said certificate of insurance was without the consent of the plaintiff, and alleges that said Clyde A. Pack designated this defendant, his mother, as beneficiary with the consent of plaintiff.

III.

Admits paragraph III of plaintiff's complaint.

IV.

Admits paragraph IV of plaintiff's complaint.

V.

Answering paragraph V of plaintiff's complaint this defendant alleges that she has no information or belief sufficient to enable her to answer the allegation contained in said paragraph V to the effect that at and prior to June 24, 1932, and at all times thereafter during his lifetime, the said Clyde A. Pack was a resident of the State of California, and basing her denial on said grounds this defendant denies generally and specifically said allegation and the whole thereof.

VI.

Denies generally and specifically the allegations of paragraph VI of plaintiff's complaint.

VII.

Answering paragraph VII of plaintiff's complaint, this defendant admits that she resides in Kirksville, Missouri, and that she claims an interest in and to said insurance contract adverse to plaintiff; denies generally and specifically each and every other allegation in said paragraph VII contained.

VIII.

Admits the allegations of paragraph VIII of plaintiff's complaint.

IX.

Answering paragraph IX of said complaint, this defendant alleges that she has no information or

belief sufficient to enable her to answer the allegations therein contained, and basing her denial on said grounds this defendant denies generally and specifically the allegations contained in paragraph IX of plaintiff's complaint.

Answering the Second Cause of Action contained in plaintiff's complaint, this defendant admits, denies, and alleges as follows: [14]

I.

That this defendant hereby repeats each and every of the denials and admissions to the matters contained in paragraphs I, II, III, IV, V, VII, VIII, and IX of plaintiff's first cause of action, and incorporates each and every of said denial and admissions by reference in this her answer to plaintiff's second cause of action.

II.

Denies generally and specifically the allegations of paragraph II of plaintiff's second cause of action.

Answering the third cause of action contained in plaintiff's complaint, this defendant admits, denies, and alleges as follows:

I.

That this defendant hereby repeats each and every of the denials and admissions to the matters contained in paragraphs I, II, III, IV, V, VII, VIII, and IX of plaintiff's first cause of action, and incorporates each and every of said denials and admissions by reference in this her answer to plaintiff's third cause of action.

II.

Denies generally and specifically the allegations contained in paragraph II of plaintiff's third cause of action.

III.

Denies generally and specifically the allegations contained in paragraph III of plaintiff's third cause of action. [15]

For a cross complaint against the plaintiff, Angel L. Pack, and the United States of America, this defendant and cross complainant, Lilly Pack, complains and alleges:

I.

That the cause of action contained in this cross complaint is founded upon the National Service Life Insurance Act of 1940, as amended (Title 38, Chapter 13, U.S. Code) and Secs. 445 and 551 of Title 38, U.S. Code.

II.

That while Clyde A. Pack was a member of the armed forces of the cross defendant, United States of America, he applied for and there was granted to him by said cross defendant, \$10,000.00 of National Service Life Insurance effective March 6, 1944, under certificate N-15,813,803, for which he designated this cross complainant, Lilly Pack, his mother, as beneficiary.

III.

That said Clyde A. Pack died on or about June 11, 1945, and that at all times from and after the aforesaid contract of insurance was granted and issued, as aforesaid, said decedent paid all of the

premiums thereon in the amounts and at the times as provided by law and the terms of said contract.

IV.

That the cross complainant, Lilly Pack, resides in Kirkesville, Missouri, and the cross defendant, Angel L. Pack, resides in Los Angeles County, California, and said cross defendant Angel L. Pack, claims an interest in and to said insurance contract adverse to this cross complainant, but that each and every claim of cross defendant, Angel L. Pack, is wholly without right and subordinate to the claim and interest of this cross complainant in and to the whole of the said insurance and the entire proceeds therefrom.

V.

That cross complainant has employed W. E. Cameron and [16] Dean Perkins, comprising the law firm of Cameron & Perkins, Attorneys at Law, admitted to practice before this Court, and members of the State Bar of California, to bring and prosecute this cross complaint and has incurred an obligation to pay her said attorneys a reasonable attorneys' fees, but not to exceed the amount and payable in the manner as provided by Title 38, Sec. 551, U. S. Code.

Wherefore, this defendant and cross complainant prays judgment as follows:

1. Against the cross defendant, United States of America, for all installments of insurance benefits which have accrued and which may hereafter be or become payable thereunder;

2. Determining that the plaintiff and cross defendant, Angel L. Pack, has no right, title, interest, or estate in or to said insurance whatsoever, or in or to any part thereof;

3. Determining and fixing cross complainant's attorneys' fees, not to exceed 10% of the amount recovered and to be paid under the judgment to be rendered herein, to be paid in the manner as provided by law;

4. And for all other and further relief as may be proper in the premises.

W. E. CAMERON AND
DEAN PERKINS,

By /s/ W. E. CAMERON,
Attorneys for Defendant and Cross Complainant,
Lilly Pack.
(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 11, 1948. [17]

[Title of District Court and Cause.]

ANSWER OF PLAINTIFF TO CROSS CLAIM
OF DEFENDANT LILLY PACK

Comes now Angel L. Pack, plaintiff herein, and answering the cross-claim of defendant Lilly Pack (which said cross-claim is erroneously designated as a "cross-complaint"), and admits, denies and alleges:

I.

Answering paragraph II of said cross-claim, plaintiff alleges that subsequent to the designation

of defendant Lilly Pack, and during his lifetime, the insured, Clyde A. Pack, designated his wife, plaintiff Angel L. Pack, as beneficiary, and that she was the last designated beneficiary prior to his death.

II.

Answering paragraph IV of said cross-claim, plaintiff admits that cross-claimant Lilly Pack resides in Kirksville, Missouri, and that the plaintiff and cross-defendant, Angel L. [19] Pack, resides in Los Angeles County, California, and denies generally and specifically, each and every, all and singular the allegations of said paragraph IV not herein expressly admitted.

III.

Further answering said cross-claim, plaintiff alleges that she (the plaintiff) is entitled to all the proceeds under said insurance to the exclusion of the cross-claimant and defendant, Lilly Pack. Plaintiff hereby adopts and repeats each and all of the allegations of her complaint as part of this answer.

Wherefore, plaintiff and cross-defendant Angel L. Pack prays that cross-claimant and defendant Lilly Pack take nothing and that this action be dismissed as to her.

IRVING G. BISHOP &
SYLVESTER HOFFMAN,
By /s/ SYLVESTER HOFFMAN,
Attorneys for Plaintiff.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 12, 1948. [20]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT UNITED STATES
OF AMERICA TO CO-DEFENDANT'S
CROSS-CLAIM

(Designated as Cross-Complaint)

Now comes the defendant United States of America, by Ernest A. Tolin, Chief Assistant United States Attorney in and for the Southern District of California, Clyde C. Downing and Robert Komins, Assistant United States Attorneys in and for the Southern District of California, and for its answer to the co-defendant's Cross-Claim (designated as Cross-Complaint) says:

I.

This defendant admits the allegations contained in paragraphs I, II, III and IV of said Cross-Claim.

II.

This defendant denies the allegations contained in paragraph V of said Cross-Claim, except to admit that in the event of the defendant Lilly Pack's recovery herein, the Court, in its discretion, may award a reasonable attorneys' fee to counsel for said defendant under Section 551, Title 38 U.S.C.A., but not to exceed 10% of the amount received by the judgment.

III.

This defendant stands ready and willing to pay the proceeds of the [22] National Service Life Insurance policy sued upon herein to such person

or persons who may be found entitled thereto, but because of the conflicting claims with respect to said proceeds, it cannot safely do so without the assistance of this Court.

IV.

In further answer to the co-defendant's Cross-Claim (designated as Cross-Complaint), this defendant adopts the prayer for relief in its answer to the plaintiff's complaint.

ERNEST A. TOLIN,
Chief Assistant U. S. Attorney,
CLYDE C. DOWNING and
ROBERT KOMINS,
Assistant U. S. Attorneys,
By /s/ ROBERT KOMINS,
Attorneys for Defendant
United States of America.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 21, 1948. [23]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above entitled cause came on regularly for trial on the 1st day of September, 1948, before the Honorable Ben Harrison, Judge of the above entitled Court, sitting without a jury, a jury having been expressly waived; Sylvester Hoffman, of Irving G. Bishop and Sylvester Hoffman, appearing as counsel for plaintiff; Ernest A. Tolin, Chief As-

sistant U. S. Attorney, Clyde C. Downing and Robert Komins, Assistant U. S. Attorneys, by Robert Komins, Assistant U. S. Attorney, appearing as counsel for defendant, United States of America, and W. E. Cameron of the law firm of Cameron & Perkins, which firm is composed of W. E. Cameron and Dean Perkins, appearing as counsel for Lilly Pack, defendant and cross-claimant, and the Court having heard and considered all the stipulations and admissions concerning evidence and proofs entered into and made by the respective parties and being fully advised in the premises, and the cause having been submitted to the Court for decision, the Court now makes its Findings of Fact and Conclusions of Law as follows: [26]

FINDINGS OF FACT

The Court finds as follows:

I.

That Clyde A. Pack, also known as Clyde Albert Pack, deceased, was born March 25, 1910; that plaintiff, Angel L. Pack was born on June 5, 1909; that defendant and cross-claimant, Lilly Pack, was born on December 11, 1883.

II.

That plaintiff Angel L. Pack is the widow of Clyde A. Pack, deceased; that defendant and cross-claimant, Lilly Pack, is the mother of said Clyde A. Pack, now deceased, and she resides in the City of Kirksville, State of Missouri.

III.

That said Clyde A. Pack enlisted in the United States Marine Corps on February 25, 1944, and was continuously in said United States Marine Corps service from the time of his acceptance therein in said month of February, 1944, until his death on or about June 11, 1945.

IV.

That this action is founded upon the National Service Life Insurance Act of 1940, as amended (Title 38, Chapter 13, U.S. Code) and Secs. 445 and 551 of Title 38, U.S. Code.

V.

That while Clyde A. Pack was a member of the armed forces of the defendant United States of America, he applied for and there was granted to him by said defendant \$10,000 of National Service Life Insurance effective March 6, 1944, under certificate N-15,813,803, for which he designated the defendant, Lilly Pack, his mother, as beneficiary, without the consent of plaintiff; that his mother, the defendant Lilly Pack, was named beneficiary at his request and no contingent beneficiary was named. [27]

VI.

That said Clyde A. Pack died on or about June 11, 1945, and that at all times from and after the aforesaid contract of insurance was granted and issued, said decedent paid all of the premiums thereon in the amounts and at the times as provided by law and the terms of said contract.

VII.

That plaintiff and the deceased insured, Clyde A. Pack, were married in Santa Ana, California, on or about June 24, 1932, and that at all times thereafter plaintiff and said insured were and continued to be husband and wife until such status was terminated by the death of said insured. That there were two children as the issue of said marriage, to-wit: Joanne Pack and Dennis Pack, and that both of them have survived their said father.

VIII.

That at and prior to June 24, 1932, and at all times thereafter during his lifetime, the aforesaid Clyde A. Pack was a resident of the State of California, and that plaintiff at all such times was a resident of said State and now is a resident thereof and of the Southern District, Central Division of said State and a resident of and domiciled in the County of Los Angeles thereof.

IX.

That said Clyde A. Pack never changed the beneficiary under all or any of the aforesaid insurance to the plaintiff, or to anyone else; that said Clyde A. Pack never designated the plaintiff as a beneficiary thereof; that the said Clyde A. Pack never designated anyone excepting his mother, the said Lilly Pack, as the beneficiary of said insurance.

X.

That the defendant and cross-claimant Lilly Pack resides in Kirksville, Missouri, and she claims an interest in and to said insurance contract adverse

to plaintiff, and each and every claim [28] of Lilly Pack is wholly right and is not subordinate to the claim and interest of plaintiff, and the said Lilly Pack is rightfully entitled to the whole of the said insurance and the entire proceeds therefrom.

XI.

That heretofore, and subsequent to the death of the aforesaid insured, plaintiff made a written claim and demand to and upon the defendant United States of America and to the Veterans Administration thereof, for payment of the proceeds of both of said contracts and the aforesaid entire insurance, and that thereafter, and prior to the commencement of this action, to-wit, on August 25, 1947, said defendant and its Veterans Administration, in writing, disagreed with plaintiff and refused to pay said claim or any part thereof, and that a disagreement exists between plaintiff and said defendant as to her claim, as aforesaid.

XII.

That plaintiff has employed Sylvester Hoffman & Irving G. Bishop, attorneys at law, admitted to practice before this Court, and members of the State Bar of California, to bring and prosecute this action and has incurred an obligation to pay her said attorneys a reasonable attorneys' fee, but not to exceed the amount and payable in the manner as provided by Title 38, Sec. 551, U.S. Code.

As Findings of Fact upon plaintiff's second cause of action the Court finds as follows:

I.

The Court makes the same findings of fact as heretofore found upon plaintiff's first cause of action and in response to the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, and IX of said first cause of action.

II.

The Court further finds that all the premiums paid by said [29] insured, Clyde A. Pack, were paid as directed by deceased by deducting the same from his earnings as a member of the United States Marine Corp, which earnings were the community property of the plaintiff and the said deceased, Clyde A. Pack.

As Findings of Fact upon plaintiff's third cause of action the Court finds as follows:

I.

The Court makes the same findings of fact as heretofore found upon plaintiff's first cause of action and in response to the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, and IX of said first cause of action.

II.

The Court further finds that all the premiums paid by said insured, Clyde A. Pack, were paid as directed by deceased by deducting the same from his earnings as a member of the United States Marine Corps, which earnings were the community property of the plaintiff and the said deceased, Clyde A. Pack.

III.

That the plaintiff never became the owner of any interest whatsoever in or to any part of said insurance at any time or at all, or of any part of the proceeds therefrom or payable thereunder; that the defendant, Lilly Pack, does not hold and will not hold any part of the proceeds which she has received or may receive therefrom in trust for the plaintiff, and none of said proceeds to be received by the defendant, Lilly Pack, will be the property of plaintiff, but all proceeds of said insurance will be rightfully the property of the defendant, Lilly Pack, as her own property and free from any trust in favor of the plaintiff or anyone else.

IV.

That the policy of insurance sued upon herein was issued pursuant to the laws of the United States, to-wit, the National [30] Service Life Insurance Act of 1940, as amended, (38 U.S.C.A., Chapter 13, Section 801, et seq.), and that the laws of the United States of America relating to said policy of insurance are paramount with respect to the naming and designating of beneficiaries by an insured thereunder, and with respect to the disposition of the proceeds of said policy of insurance, and that said National Service Life Insurance Act of 1940, as amended, and all regulations promulgated pursuant to the authority granted by said statute, are not affected, modified or controlled by any laws or regulations of the State of California to the contrary, and the said naming of beneficiaries and disposition of the proceeds of said policy of

insurance are not subject to and cannot be controlled or governed by the community property laws or any other law of the State of California.

As Findings of Fact upon the cross-claim of defendant, Lilly Pack, the Court finds:

I.

The Court finds specially that each and all the allegations contained in said cross-claim, erroneously designated cross-complaint, are true and correct.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

That the Court has jurisdiction to hear and determine this case under the provisions of Title 38, U. S. C. A. Sections 445 and 817. [31]

II.

That the residence of the plaintiff, Angel L. Pack, and her deceased husband, Clyde A. Pack, was at all times herein involved, and at the time of his death, in the State of California.

III.

That the disposition of the proceeds or benefits of the policy of insurance sued upon herein, which was issued pursuant to the provisions of the National Service Life Insurance Act of 1940, as amended, (38 U. S. C. A., Chapter 13, Section 801, et seq.), is not subject to and cannot be controlled or governed by the community property laws of the State of California.

IV.

That the community property laws of the State of California cannot and do not change the terms of the policy of insurance sued upon herein, (the contract for which was entered into by the said Clyde A. Pack with the defendant United States of America), and that the proceeds and all benefits of said policy of insurance are payable according to the terms of said contract.

V.

That plaintiff is not entitled to take anything by this action.

VI.

That plaintiff has no right or claim in or to the Insurance Policy sued on herein or in or to any of the proceeds thereof.

VII.

That defendant and cross-claimant Lilly Pack is the legally qualified beneficiary of, and entitled to receive the benefits of, the policy of National Service Life Insurance sued on herein in the sum of \$10,000 on the life of Clyde A. Pack, deceased, less five per cent of such amount which is to be deducted therefrom as attorneys fees. [32]

VIII.

That five per cent of any amounts payable to Lilly Pack by the United States Veterans Administration as proceeds of such policy of National Service Life Insurance be paid to W. E. Cameron and Dean Perkins as attorneys' fees for services

rendered on behalf of said Lilly Pack in the defense of this action.

Let Judgment be entered accordingly.

Dated this 22 day of September, 1948.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed Sept. 22, 1948. [33]

In the District Court of the United States in and
for the Southern District of California,
Central Division

No. 7651-BH

ANGEL L. PACK,

Plaintiff,

vs.

UNITED STATES OF AMERICA and
LILLY PACK,

Defendants.

JUDGMENT

The above entitled cause coming on regularly for trial on the 1st day of September, 1948, before the Honorable Ben Harrison, Judge Presiding, the plaintiff appearing by Irving G. Bishop & Sylvester Hoffman by Sylvester Hoffman, her attorneys, and the defendant United States of America appearing by Ernest A. Tolin, Chief Assistant U. S. Attorney, Clyde C. Downing and Robert Komins, Assistant United States Attorneys, by Robert Komins, As-

sistant United States Attorney, and the defendant and cross-claimant, Lilly Pack, appearing by W. E. Cameron and Dean Perkins by W. E. Cameron; trial by jury having been waived; the cause was tried before the Court sitting without a jury, and the Court having heard the evidence therein and the cause having been submitted to the Court for decision, and the Court having heretofore made its findings of fact and conclusions of law, upon said findings and conclusions it is hereby ordered, adjudged and decreed as follows:

1. That plaintiff above named take nothing by her action [35] and that the plaintiff has no right or claim in or to the policy of insurance sued upon herein or in or to any of the proceeds thereof and that Judgment be and the same is hereby rendered in favor of defendants, United States of America and Lilly Pack.

2. That the defendant and cross-claimant Lilly Pack is the legally qualified beneficiary of and entitled to receive, the benefits of the policy of National Service Life Insurance sued on herein in the sum of \$10,000 on the life of Clyde A. Pack, deceased, less five per cent of such amount which is to be deducted therefrom as attorneys' fees.

3. That the United States of America by and through the Veterans Administration pay to Lilly Pack the proceeds of the policy of National Service Life Insurance sued on herein, in the sum of \$10,000 on the life of Clyde A. Pack, deceased, in accordance with the terms and provisions of said policy of insurance, after deducting from each pay-

ment ten per cent thereof as attorneys' fees, which said amounts deducted from each payment as attorneys' fees shall be paid to W. E. Cameron and Dean Perkins, Attorneys at Law, 324 Elm Avenue, Long Beach 12, California, until the sum of \$500.00 has been thus paid, as attorneys' fees for services rendered on behalf of said Lilly Pack in the defense of this action.

Done in open Court this 22 day of September, 1948.

/s/ BEN HARRISON,

United States District Judge.

[Endorsed]: Filed Sept. 22, 1948. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS

Notice is hereby given that Angel L. Pack, the plaintiff above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 22, 1948.

Dated: November 19, 1948.

IRVING G. BISHOP &
SYLVESTER HOFFMAN,
By SYLVESTER HOFFMAN,

Attorneys for appellant Angel L. Pack

[Endorsed]: Filed Nov. 19, 1948. [38]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The Appellant states that points upon which she intends to rely on the appeal in this action are as follows:

1. That the evidence is not sufficient to sustain the judgment;

2. That facts found in paragraph X of the Findings of Fact concerning Appellant's First Cause in her Complaint is not supported by and are contrary to the law and to the stipulated facts in this cause;

3. That the facts found in paragraphs III and IV of the aforesaid Findings of Fact, concerning Appellant's Third Count, are not supported by and are contrary to the law and to the stipulated facts in this cause;

4. That the District Court erred in its Conclusions of Law numbered III to VIII, both inclusive, and that each and all [43] of said Conclusions are contrary to the law and to the stipulated facts in this cause;

5. That the District Court erred in finding and adjudicating that Appellant was barred from claiming any interest in the insurance sued upon by virtue of or under her vested rights in such community property;

6. That the District Court erred in failing to find and adjudicate that appellee, Lilly Pack, was estopped from claiming or asserting any interest in and to appellant's vested interest in said insur-

ance, which was the community property of Appellant and the deceased insured;

7. That the District Court erred in not finding and adjudicating that, as between Appellant, Angel L. Pack and Appellee, Lilly Pack, said Appellee held or would hold, as received, one-half of the proceeds from said community property in trust for Appellant; and

8. That the District Court erred in not finding and adjudicating that Appellee, Lilly Pack, should be required to execute a written assignment of one-half of the said community property to Appellant.

SYLVESTER HOFFMAN &
IRVING G. BISHOP,

By SYLVESTER HOFFMAN,
Attorneys for Appellant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Nov. 24, 1948. [44]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 47, inclusive, contain full, true and correct copies of Complaint on Insurance Contract Issued by the United States; Answer of the United States of America; Answer and Cross-Complaint of Lilly Pack; Answer of Plaintiff to Cross-Claim of Defendant Lilly Pack; Answer of United

States of America to Co-Defendant's Cross-Claim; Stipulation and Order Waiving Trial by Jury; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Bond for Costs on Appeal; Statement of Points and Stipulation as to Record which, together with copy of reporter's transcript of proceedings on September 1, 1948, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$11.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24 day of December, A.D. 1948.

(Seal) EDMUND L. SMITH,
Clerk.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California,

September 1, 1948, 10:00 o'clock a.m.

The Clerk: Pack vs. United States of America, et al.

Mr. Hoffman: I understand that the parties are willing to stipulate that the facts alleged in Paragraphs I, II, III, IV and V of the plaintiff's complaints are true.

The Court: Isn't this the sum and substance of your problem, that these is no evidence that there

was any act on the part of the deceased to change the beneficiary?

Mr. Hoffman: We were going to stipulate to that. In other words, it is stipulated that the facts alleged in Paragraphs I, II, III, IV and V of the plaintiff's complaint are true.

Mr. Komins: That is correct.

Mr. Hoffman: Mr. Cameron, is that correct?

Mr. Cameron: I will have to check on that.

The Court: If you will excuse me a moment, I will get the pre-trial statement.

Mr. Hoffman: The stipulation is that the facts alleged in Paragraphs I, II, III, IV and V of plaintiff's complaint are true. It is further stipulated that at no time during his lifetime did the deceased, Clyde A. Pack, ever designate plaintiff as beneficiary. In other words, he never executed any instrument that was in effect a change of beneficiary, and that the facts alleged in Paragraph VI of the complaint [2] are not true.

Is it so stipulated?

Mr. Komins: That is correct.

Mr. Cameron: That is true.

Mr. Hoffman: In Paragraph VII, that the defendant Lilly Pack resides in Kirksville, Missouri, and that she claims an interest in and to said insurance contract adverse to plaintiff,—it is stipulated that is true.

The last part is a conclusion, that all of her claims are without right.

It is also stipulated that the facts alleged in Paragraphs VIII and IX are true.

Mr. Cameron: Yes, the defendant Lilly Pack so stipulates.

Mr. Komins: So stipulated.

Mr. Hoffman: It will also be stipulated that all of the premiums that were paid upon the insurance by the deceased insured as described in Paragraph II of the second count of the complaint, were deducted from payments and paid to the deceased insured from the United States Marine Corps, while he was serving in the United States Marine Corps.

Mr. Cameron: That is stipulated.

Mr. Komins: So stipulated.

Mr. Hoffman: That is the stipulation of facts, your Honor. [3]

Mr. Komins: It is stipulated that Clyde A. Pack, also known as Clyde Albert Pack, was born March 25, 1910; that plaintiff, Angel L. Pack, was born on June 5, 1909, and the co-defendant, Lilly Pack, was born on December 11, 1883.

Mr. Hoffman: So stipulated for the plaintiff.

Mr. Cameron: So stipulated for the defendant and cross-complainant, Lilly Pack.

Mr. Hoffman: I have nothing further in the way of stipulations.

Mr. Cameron: Turning to paragraph V on page 4 of the answer of Lilly Pack, will the facts set forth in paragraph V be stipulated to?

Mr. Hoffman: The plaintiff will stipulate that the facts set forth therein are true.

Mr. Cameron: Maybe you will stipulate that, if the court makes award in favor of the claimant

Lilly Pack, it may award attorney's fees as provided by statute, namely, not to exceed 10 per cent? That is Title 38, Section 55.

The Court: Yes. Is there any argument?

(Argument.)

The Court: I feel that it was quite a solemn pact the government made with the members of the armed forces, that they provide insurance for their named beneficiaries. I feel that that was a solemn obligation on the part of the government. I am going to direct that the proceeds of the policy [4] be paid to the mother, from the proceeds of the policy itself. With respect to attorney's fees. I understand that 10 per cent is the maximum. I wonder if this case justifies a maximum fee.

Mr. Cameron: I do not content that it should be the maximum fee.

The Court: Well, what do you think would be reasonable?

Mr. Cameron: \$500.

Mr. Hoffman: Counsel means 5 per cent instead of 10 per cent.

Mr. Komins: I would suggest that it be in percentage instead of a fixed fee. [5]

[Endorsed]: Filed Dec. 23, 1948.

[Endorsed]: No. 12139. United States Court of Appeals for the Ninth Circuit. Angel L. Pack, Appellant, vs. United States of America and Lilly Pack, Appellees. Transcript of Record. Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed December 27, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Circuit Court of Appeals
Ninth Judicial Circuit

No. 12139

ANGEL L. PACK,

Appellant,

vs.

UNITED STATES OF AMERICA
and LILLY PACK,

Appellees.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

I.

STATEMENT OF POINTS

Appellant hereby adopts as her points on appeal, the statement of points in the transcript of the record filed in the above entitled Court.

Dated: January 4th, 1949.

IRVING G. BISHOP &

SYLVESTER HOFFMAN,

By /s/ SYLVESTER HOFFMAN,

Attorneys for Appellant Angel L. Pack.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed January 5, 1949. Paul P. O'Brien, Clerk.